



RULE-MAKING ORDER

CR-103 (June 2004)
(Implements RCW 34.05.360)

Agency: Department of Social and Health Services, Aging and Disability Services Administration

☐ Permanent Rule
☒ Emergency Rule

Effective date of rule:

Permanent Rules

- ☐ 31 days after filing.
☐ Other (specify) _____ (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

Effective date of rule:

Emergency Rules

- ☒ Immediately upon filing.
☐ Later

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

☐ Yes ☒ No If Yes, explain:

Purpose: The department is proposing these amendments and new text to change transfer of asset rules for clients found eligible for long-term care (LTC) services. This change is due to the 2005 federal Deficit Reduction Act (DRA). The new WAC section is entitled, WAC 388-513-1363, Evaluating the Transfer of an Asset for Clients Found Eligible for LTC Services on or After May 1, 2006. The Department will be updating WAC 388-513-1330 to include a reference to WAC 388-513-1363 and WAC 388-513-1364.

Citation of existing rules affected by this order:

Repealed: None
Amended: WAC 388-513-1330
Suspended: None

Statutory authority for adoption: RCW 74.04.050, 74.04.057, 74.08.090, 74.09.575

Other authority: 2005 federal Deficit Reduction Act (DRA), Public Law 109-171

PERMANENT RULE ONLY (Including Expedited Rule Making)

Adopted under notice filed as WSR _____ on _____ (date)
Describe any changes other than editing from proposed to adopted version:

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:

Name: _____ phone () _____
Address: _____ fax () _____

ADOPTION
PERMANENT
EMERGENCY
EFFECTIVE DATE:
8/25/06

EMERGENCY RULE ONLY

Under RCW 34.05.350 the agency for good cause finds:

- ☐ That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
☒ That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this finding: The department must adopt the applicable language from the federal Deficit Reduction Act (P.L. 109-171) in order for the state to remain eligible for federal Medicaid funding. This filing continues the emergency rule filed as WSR 06-10-045 while the department completes adoption of permanent rules initiated under WSR 06-10-020. DSHS is planning on filing a CR 102 on this WAC by October. DSHS is in the process of receiving final direction from the federal Centers for Medicare and Medicaid Services (CMS) on DRA issues.

Date adopted:

8/23/06

NAME (TYPE OR PRINT)

Andy Fernando

SIGNATURE

TITLE

Manager, Rules and Policies Assistance Unit

CODE REVISER USE ONLY

AUG 25

944
06-18-021

(COMPLETE REVERSE SIDE)

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.

The number of sections adopted in order to comply with:

Federal statute:	New	<u>1</u>	Amended	<u>1</u>	Repealed	___
Federal rules or standards:	New	___	Amended	___	Repealed	___
Recently enacted state statutes:	New	___	Amended	___	Repealed	___

The number of sections adopted at the request of a nongovernmental entity:

New	___	Amended	___	Repealed	___
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The number of sections adopted in the agency's own initiative:

New	___	Amended	___	Repealed	___
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	___	Amended	___	Repealed	___
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The number of sections adopted using:

Negotiated rule making:	New	___	Amended	___	Repealed	___
Pilot rule making:	New	___	Amended	___	Repealed	___
Other alternative rule making:	New	<u>1</u>	Amended	<u>1</u>	Repealed	___

AMENDATORY SECTION (Amending WSR 06-07-077, filed 3/13/06, effective 4/13/06)

WAC 388-513-1330 Determining available income for legally married couples for long-term care (LTC) services. This section describes income the department considers available when determining a legally married client's eligibility for LTC services.

(1) The department must apply the following rules when determining income eligibility for LTC services:

(a) WAC 388-450-0005(3), Income--Ownership and availability and WAC 388-475-0200, SSI-related medical;

(b) WAC 388-450-0085, Self-employment income--Allowable expenses;

(c) WAC 388-450-0210 (4)(b) and (e), Countable income for medical programs, and WAC 388-475-0750, SSI-related medical - Countable unearned income;

(d) WAC 388-506-0620, SSI-related medical clients; and

(e) WAC 388-513-1315 (15) and (16), Eligibility for long-term care (institutional, waiver, and hospice) services.

(2) For an institutionalized client married to a community spouse who is not applying or approved for LTC services, the department considers the following income available, unless subsection (4) applies:

(a) Income received in the client's name;

(b) Income paid to a representative on the client's behalf;

(c) One-half of the income received in the names of both spouses; and

(d) Income from a trust as provided by the trust.

(3) The department considers the following income unavailable to an institutionalized client:

(a) Separate or community income received in the name of the community spouse; and

(b) Income established as unavailable through a fair hearing.

(4) For the determination of eligibility only, if available income described in subsections (2)(a) through (d) minus income exclusions described in WAC 388-513-1340 exceeds the special income level (SIL), then:

(a) The department follows community property law when determining ownership of income;

(b) Presumes all income received after marriage by either or both spouses to be community income; and

(c) Considers one-half of all community income available to the institutionalized client.

(5) If both spouses are either applying or approved for LTC services, then:

(a) The department allocates one-half of all community income described in subsection (4) to each spouse; and

(b) Adds the separate income of each spouse respectively to determine available income for each of them.

(6) The department considers income generated by a transferred

resource to be the separate income of the person or entity to which it is transferred.

(7) The department considers income not generated by a transferred resource available to the client, even when the client transfers or assigns the rights to the income to:

(a) The spouse; or

(b) A trust for the benefit of the spouse.

(8) The department evaluates the transfer of a resource described in subsection (6) according to WAC 388-513-1363, 388-513-1364, 388-513-1365 and 388-513-1366 to determine whether a penalty period of ineligibility is required.

NEW SECTION

WAC 388-513-1363 Evaluating the transfer of an asset for clients found eligible for LTC services on or after May 1, 2006. This section describes how the department evaluates asset transfers made on or after May 1, 2006, by a client who is applying for or receiving Long Term Care (LTC) services. The department must consider whether a transfer made within a specified time before the month of application, or while the client is receiving LTC services, requires a penalty period. Clients subject to asset transfer penalty periods are not eligible for LTC services. Refer to WAC 388-513-1364 for rules used to evaluate asset transfers made on or after April 1, 2003 and before May 1, 2006. Refer to WAC 388-513-1365 for rules used to evaluate asset transfer made prior to April 1, 2003.

(1) The department does not apply a penalty period to the following transfers by the client, if they meet the conditions described:

(a) Gifts or donations totaling the average daily private nursing facility rate or less in any month;

(b) The transfer of an excluded resource described in WAC 388-513-1350 with the exception of the client's home, unless the transfer of the client's home meets the conditions described in subsection (1)(d);

(c) The transfer of an asset for less than fair market value (FMV), if the client can provide evidence to the department of one of the following:

(i) An intent to transfer the asset at FMV or other adequate compensation;

(ii) The transfer is not made to qualify for LTC services;

(iii) The client is given back ownership of the asset;

(iv) The denial of eligibility would result in an undue hardship, see subsection (13) for further instructions.

(d) The transfer of ownership of the client's home, if it is transferred to the client's:

(i) Spouse; or

(ii) Child, who:

(A) Meets the disability criteria described in WAC 388-511-1105 (1)(b) or (c); or

(B) Is less than twenty-one years old; or

(C) Lived in the home for at least two years immediately before the client's current period of institutional status, and provided care that enabled the client to remain in the home; or

(iii) Brother or sister, who has:

(A) Equity in the home, and

(B) Lived in the home for at least one year immediately before the client's current period of institutional status.

(e) The asset is transferred to the client's spouse or to the client's child, if the child meets the disability criteria described in WAC 388-511-1105(1)(b) or (c);

(f) The transfer of an asset, if the transfer meets the

conditions described in subsection (2), and the asset is transferred:

- (i) To another person for the sole benefit of the spouse;
- (ii) From the client's spouse to another person for the sole benefit of the spouse;

- (iii) To trust established for the sole benefit of the client's child who meets the disability criteria described in WAC 388-511-1105(1)(b) or (c);

- (iv) To a trust established for the sole benefit of a person who is sixty-four years old or younger and meets the disability criteria described in WAC 388-511-1105(1)(b) or (c); or

(2) The department considers the transfer of an asset or the establishment of a trust to be for the sole benefit of a person described in subsection (1)(f), if the transfer or trust:

- (a) Is established by a legal document that makes the transfer irrevocable;

- (b) Provides that no individual or entity except the spouse, blind or disabled child, or disabled individual can benefit from the assets transferred in any way, whether at the time of the transfer or at any time during the life of the primary beneficiary; and

- (c) Provides for spending all assets involved for the sole benefit of the individual on a basis that is actuarially sound based on the life expectancy of that individual or the term of the trust, whichever is less; and

- (d) The requirements in subsection (2)(c) of this section do not apply to trusts described in WAC 388-561-0100 (6)(a) and (b) and (7)(a) and (b).

(3) The department does not establish a period of ineligibility for the transfer of an asset to a family member prior to the current period of institutional status, if:

- (a) The transfer is in exchange for care services the family member provided the client;

- (b) The client has a documented need for the care services provided by the family member;

- (c) The care services provided by the family member are allowed under the Medicaid state plan or the department's waived services;

- (d) The care services provided by the family member do not duplicate those that another party is being paid to provide;

- (e) The FMV of the asset transferred is comparable to the FMV of the care services provided;

- (f) The time for which care services are claimed is reasonable based on the kind of services provided; and

- (g) Compensation has been paid as the care services were performed or with no more time delay than one month between the provision of the service and payment.

(4) The department considers the transfer of an asset in exchange for care services given by a family member that does not meet the criteria as described under subsection (3) as the transfer of an asset without adequate consideration.

(5) When evaluating the effect of the transfer of an asset made on or after May 1, 2006 on a client's eligibility for LTC services the department counts sixty months before the month of application to establish what is referred to as the "look-back" period.

(6) If a client or the client's spouse transfers an asset within the look-back period without receiving adequate compensation, the result is a penalty period in which the client is not eligible for LTC services.

(7) If a client or the client's spouse transfers an asset on or after May 1, 2006, the department must establish a penalty period by adding together the total uncompensated value of all transfers made on or after May 1, 2006. The penalty period:

(a) For a LTC services applicant, begins on the date the client would be otherwise eligible for LTC services based on an approved application or the first day after any previous penalty period has ended; or

(b) For a LTC services recipient, begins the first of the month following the transfer allowing for reporting requirement timeframes described in WAC 388-418-007; or the first day after any previous penalty period has ended; and

(c) Ends on the last day of the number of whole days found by dividing the total uncompensated value of the assets by the statewide average daily private cost for nursing facilities at the time of application or the date of transfer, whichever is later.

(8) If an asset is sold, transferred, or exchanged, the portion of the proceeds:

(a) That is used within the same month to acquire an excluded resource described in WAC 388-513-1360 does not affect the client's eligibility;

(b) That remain after an acquisition described in subsection

(8)(a) becomes an available resource as of the first day of the following month.

(9) If the transfer of an asset to the client's spouse includes the right to receive a stream of income not generated by a transferred resource, the department must apply rules described in WAC 388-513-1330 (6) through (8).

(10) If the transfer of an asset for which adequate compensation is not received is made to a person other than the client's spouse and includes the right to receive a stream of income not generated by a transferred resource, the length of the penalty period is determined and applied in the following way:

(a) The total amount of income that reflects a time frame based on the actuarial life expectancy of the client who transfers the income is added together;

(b) The amount described in subsection (10)(a) is divided by the statewide average daily private cost for nursing facilities at the time of application; and

(c) A penalty period equal to the number of whole days found by following subsections (7)(a), (b), and (c).

(11) A penalty period for the transfer of an asset that is applied to one spouse is not applied to the other spouse, unless:

(a) Both spouses are receiving LTC services; and

(b) A division of penalty period between the spouses is requested.

(12) If a client or the client's spouse disagrees with the determination or application of a penalty period, that person may request a hearing as described in chapter 388-02 WAC.

(13) An undue hardship exists when application of the transfer of assets provision would deprive the individual:

(a) Of medical care that would endanger an individual's health

or life; or

(b) Of food, clothing, shelter, or other necessities of life;

or

(c) Which provides for:

(i) Notice to recipients that an undue hardship exception exists;

(ii) A timely process for determining whether an undue hardship waiver will be granted; and

(iii) A process under which an adverse determination can be appealed.